127

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No. 08-1139

In the

Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,
Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

INTRODUCTION

Petitioner Action Apartment Association seeks review of the California Court of Appeal's decision holding that the heightened scrutiny of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), does not apply to legislatively imposed exactions. Respondents City of Santa Monica *et al.* (City) argue against a grant of certiorari, but their contentions actually weigh in favor of this Court's review.

First, the City argues that Ordinance 2191's waiver provision makes the Association's challenge premature; but the City does not recognize that whether a waiver provision like Ordinance 2191's (which places the burden of proof on the waiver applicant) is itself constitutional merits this Court's review. Second, the City misreads *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), for the proposition that *Nollan* and *Dolan* do not apply to certain types of exactions, such as those property interests exacted as part of an inclusionary zoning scheme. The City concludes that the petition does not merit this Court's review, even though many of the lower courts that have split on the legislative-adjudicative distinction have also split on the issue of whether only certain types of exactions are subject to heightened scrutiny. Thus, the City's basis for denying the petition in fact lends further support to the importance of this Court's review of the issue. Finally, the City contends that the lower courts should be given more time to address whether inclusionary zoning ordinances should be subject to *Nollan* and *Dolan*. But allowing the issue to "percolate" further would serve no purpose except to

exacerbate already existing conflicts. The petition should be granted.

ARGUMENT

I

THE CITY'S STATEMENT OF THE CASE RAISES CONCERNS THAT ARE PROPERLY ADDRESSED ON REMAND

The City contends that through density bonus laws and other perquisites, Ordinance 2191's impact on developers is substantially attenuated. Opposition at 2-3. Whether or not the City's characterization of those perquisites is accurate, it is an issue that is properly considered only *after* the prescinding determination has been made of the level of scrutiny to be applied. In other words, whether or not developers are sufficiently compensated so as to have no constitutional claim against Ordinance 2191 properly pertains to whether a rough proportionality exists between the potential harm of new market-rate housing and the rights exacted from developers of such housing under Ordinance 2191. The degree to which any density bonus or other perquisite makes Ordinance 2191's exactions roughly proportional has no bearing on whether the petition merits this Court's review.[1]

The City also objects to the Association's characterization of how Ordinance 2191 is applied. *See* Opposition at 4-7. Again, whether or not the City's assessment of Ordinance 2191's operation is accurate is an issue properly considered only once the level of

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[1] For the same reason, the City's allusion to its supposed "Nexus" study, *see* Opposition at 3 n.2, is irrelevant.

scrutiny has been determined. Nothing in the City's description changes the fact that Ordinance 2191 conditions building permits on giving up valuable property rights. And this fact alone raises the legal question presented in the petition: Should legislatively imposed exactions be subject to less rigorous judicial review?

II

THE CITY'S CONTENTION THAT THE ASSOCIATION'S CONSTITUTIONAL CHALLENGE IS UNRIPE PRESENTS AN ADDITIONAL BASIS FOR THIS COURT'S REVIEW

The City argues that review is unwarranted because the Association's facial claims are unripe. *See* Opposition at 7-8. Specifically, the City contends that Ordinance 2191's waiver provision—which allows a developer to obtain a waiver of the affordable housing mandate if the developer can establish that application of that mandate to it would be unconstitutional, *see* Petitioner's Appendix (Pet. App.) at E.20 (§ 9.56.170(b))—precludes any facial challenge. The City's argument is without merit and, in any event, only supports this Court's review.

In *Dolan*, this Court expressly placed the burden on the government to establish nexus and rough proportionality. 512 U.S. at 391 ("[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."). In contrast, Ordinance 2191's waiver provision unconstitutionally places the burden of proof on the applicant by requiring that a permit applicant

establish that the application of the Ordinance would be unconstitutional. For this reason, the waiver provision cannot bar a facial challenge: either *Nollan* and *Dolan* apply to Ordinance 2191, and the waiver provision is an unconstitutional attempt to shift the burden of proof to the permit applicant, or *Nollan* and *Dolan* do not apply, and the waiver provision becomes irrelevant.

Hence, not only is the Association's challenge ripe, but the City's arguments to the contrary actually weigh in favor of granting review by highlighting the distinct yet important legal question of whether waiver provisions like Ordinance 2191's can effectively bar facial challenges under *Nollan* and *Dolan*.

III

THE PETITION SQUARELY PRESENTS THE LEGISLATIVE-ADJUDICATIVE DISTINCTION FOR THIS COURT'S REVIEW

A. The City Misreads *Lingle* and Improperly Limits the Scope of *Nollan* and *Dolan*

In opposing the Association's petition, the City contends, relying upon *Lingle*, that the requirements of Ordinance 2191 are not the type of exactions covered by *Nollan* and *Dolan*. *See* Opposition at 8-12. The argument is unfounded, for several reasons.

First, *Lingle* did not limit the scope of *Nollan* and *Dolan* just to only certain types of exactions. The Court explicitly stated that nothing in its decision should be read as changing the law of exactions. *See* 544 U.S. at 547. The Court went further to confirm

that *Nollan* and *Dolan* "involve a special application of the doctrine of unconstitutional conditions." *Id.* (internal quotations omitted). Nowhere does *Lingle* adopt the restrictive interpretation the City advances. Second, scholarly commentary has consistently interpreted *Nollan* and *Dolan* as applying, in the land use context, whenever government conditions its permitting power on an applicant's giving up of some valuable right. *See* Petition at 15 n.4 (citing authorities). Third, the City's narrow conception of a "qualifying" exaction comports neither with modern regulatory practice, in which use of exactions has expanded to fund all sorts of social welfare programs,[2] nor with the academy's understanding.[3]

The City's narrow understanding of the scope of *Nollan* and *Dolan* is therefore without merit.

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[2] Steven J. Eagle, *Regulatory Takings* § 4-4(e) (3d ed. 2005) ("Linkage fees are fees imposed upon development to fund the costs of governmental programs that are 'linked' to that development. . . . Linkage fees have been controversial precisely because they do not constitute subdivision controls. . . . Instead, they are exactions, for social welfare purposes, imposed on the occasion of development.").

[3] Daniel S. Huffenus, Dolan *Meets* Nollan: *Towards a Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. Envtl. L.J. 30, 33 (1995) ("Generally, any requirement that a developer provide or do something as a condition of receiving municipal approval is an exaction.").

B. The Extent to Which the Lower Courts Are Divided over the Type of Exactions Subject to *Nollan* and *Dolan* Provides Further Ground for this Court's Review

The City contends that the petition presents a poor vehicle for review of the legislative-adjudicative distinction because inclusionary zoning ordinances do not exact any interest cognizable under *Nollan* and *Dolan*. *See* Opposition at 12-14. The City's position is faulty, for at least two reasons.

First, the court of appeal's decision below squarely rests upon the assertion that the heightened scrutiny of *Nollan* and *Dolan* "applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative . . . zoning decisions." Pet. App. at A-18. On that basis, the court of appeal affirmed the dismissal of the Association's facial challenge to Ordinance 2191. *See id.* at A-21. The legislative-adjudicative distinction is directly raised.

Second, the City's arguments for a restrictive view of *Nollan* and *Dolan* merely reinforce the need for this Court's review. Just as many lower courts have held that legislative exactions should be subject to heightened scrutiny, many courts have also held that *Nollan* and *Dolan* should apply to a broad range of exactions, not just real property interests. *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) (costs for street improvements); *Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 354-56 (Ohio 2000) (same); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868-69 (1996) (recreation and public art fees).

Other courts, however, have adopted more limited understandings of *Nollan* and *Dolan* and the types of exactions that are subject to heightened scrutiny. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008), *pet'n for cert. pending* (declining to apply heightened scrutiny to a development condition that "does not require the owner to relinquish rights in the real property"); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997) (declining to apply heightened scrutiny to a fee exaction in part because "a fee [is] a considerably more benign form of regulation" than an exaction of real property).[4]

Thus, the debate over whether inclusionary zoning ordinances are subject to an exactions analysis under *Nollan* and *Dolan*, rather than undercutting review in the City's opinion, in fact supports this Court's review of the Association's petition, by highlighting another basis upon which lower courts are divided.

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[4] *Cf.* 2A Nichols, *Eminent Domain* § 6.13[3][b], at 6 218 (3d ed. 2002) ("[A]n important distinction [exists] between ordinances requiring installation of streets, sidewalks, sewers and drainage facilities which are inextricably tied to the needs of the subdivision development, and those ordinances which require dedication of land . . . where the nexus between the use requirement and the subdivision development is less than evident.").

IV

RESOLUTION OF THE CONFLICT AMONG THE LOWER COURTS OF THE LEGISLATIVE-ADJUDICATIVE DISTINCTION IS RIPE, AND FURTHER DEVELOPMENT OF THAT CONFLICT IS UNNECESSARY

The City's final argument against review is that lower courts should be given more time to address whether to apply heightened scrutiny to inclusionary zoning ordinances. *See* Opposition at 15-16. The contention is without merit, for two reasons.

First, as demonstrated in the petition, *see* Petition at 8-11, and this reply brief, *see supra* Part III.B, the lower courts are already sharply divided on the import of the legislative-adjudicative distinction, *as well as* on whether heightened scrutiny should be applied to all or just certain types of exactions. Refusing to address these issues now will serve no purpose other than to exacerbate existing conflicts.

Second, contrary to the City's view, *see* Opposition at 16, it is of no moment that there are few reported cases reviewing the constitutionality of inclusionary zoning ordinances. One could easily have said that there were few if any cases addressing dedication of beach easements when this Court chose to review *Nollan*, or that there were few if any cases addressing dedication of green belts and bicycle paths when this Court chose to review *Dolan*. What matters is not whether the precise factual circumstances at issue here have been repeated in other cases and jurisdictions. Rather, what matters is that the *issue* raised by the particular facts here—whether *Nollan* and *Dolan* apply

to legislatively imposed exactions—is one of significant importance to property owners throughout the nation, over which the lower courts have reached sharply different conclusions. Review is merited.

CONCLUSION

For the foregoing reasons, the petition should be granted.

DATED: April, 2009.

Respectfully submitted,

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